United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1016

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

To Be Argued By:

Peter Goldberger

Docket No. 77-1016

B p/s

UNITED STATES OF AMERICA

APPELLEE

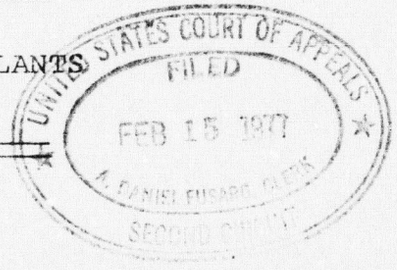
-vs-

LUIS E. CHICO and GAIL A. COLELLO

APPELLANTS

On Appeal From the United States District Court
For the District of Connecticut

BRIEF FOR APPELLANTS



PETER GOLDBERGER
ASST. FEDERAL PUBLIC DEFENDER
770 Chapel Street
New Haven, Connecticut 06510
(FTS) 8-643-8148
Attorney for Appellants

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QUESTION PRESENTED

When an accused probation violator alleges and proves that his conviction entered in violation of the Interstate Agreement on Detainers, should the district court dismiss the violation proceedings, vacate the conviction and dismiss the indictment?

UNITED STATES COURT OF APPEALS

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STATEMENT

This case arises out of proceedings related to alleged violations of probation. Two probationers appeal from orders of the United States District Court for the District of Connecticut, T. Emmet Clarie, C.J., extending periods of probation by one year and adding a special condition of probation, and denying reconsideration of the probationers' motion to dismiss violation proceedings and to vacate judgment. The orders extending probation and adding a special condition were entered December 6, 1976, and filed December 13, 1976.

App. 9-11. The initial refusal to dismiss the violation proceedings occurred on December 6, 1976, and the order denying reconsideration was filed December 14, 1976. App. 12. Timely notice of appeal was filed December 16, 1976. App. 14.

The appellants, who have considered themselves to be husband and wife for some ten years, each pleaded guilty to one count of an indictment charging them with aiding and abetting a bank employee in embezzling funds; 18 U.S.C. §§2, 656. App. 4-6. Colello's plea was entered December 4, 1972, and she was sentenced on February 5, 1973, to two years' probation. Chico pleaded guilty on February 27, 1973, and was sentenced on June 25, 1973, to two years' probation with a special condition of restitution. Each of the appellants was a prisoner in the custody of the state of Connecticut throughout the proceedings in 1972 and 1973. The terms of probation were to be served consecutively to the imprisonment then in effect. During these proceedings, each appellant was represented by separate, private, court-appointed counsel.

On October 14, 1976, warrants issued for the arrest of both probationers, essentially charging that they had absconded from supervision and that their whereabouts were unknown. App. 7-8. Upon learning that they were sought, the probationers surrendered themselves to the FBI in New Haven on November 24, 1976. A preliminary hearing was held that day before United States Magistrate Arthur H. Latimer, at which undersigned counsel (the office of the Federal Public

Defender) was appointed,[1] and the probationers, counsel, magistrate, and probation officer agreed that the adjudicatory and dispositional phases of the probation violation proceedings might be consolidated before Judge Clarie on December 6, 1976. The probationers signed non-surety personal appearance bonds and were permitted to return homepending their hearing.

At the probation hearing, counsel moved on behalf of both probationers to dismiss the proceedings and vacate the judgments of conviction and sentence. Counsel argued that at the time of sentencing in 1973, the indictments were not "of any further force or effect" by virtue of Article IV(e) of the Interstate Agreement on Detainers, and that the court had therefore lacked jurisdiction to impose the sentences of probation which had allegedly been violated. Counsel relied on this Court's ruling in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976). The district court summarily denied the motion to dismiss, rejecting counsel's request for leave to file a memorandum.

On the merits, the probationers admitted technical violation of the probationary requirement that they not change their place of residence without notifying the probation officer. (Chico acknowledged that he had not yet made the restitution required of him, but denied any violation on that account,

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1/ Before the Magistrate both probationers were fully advised as to the possibility of a conflict of interest in joint representation. There, and again before Judge Clarie, they waived any right to separate counsel.

because the time allowed for making the repayments had not expired.) In mitigation of punishment counsel argued that Ms. Colello's mother, who has had custody of the probationers' eight-year old daughter, had moved to southern New Jersey and taken their child with her. Fearing that permission to leave Connecticut might be denied, especially to Chico who was also on state parole, and not realizing that supervision of a probationer can be transferred from district to district (18 U.S.C. §3653(¶2)), they simply moved to Camden to remain near their daughter. There, they each obtained employment, and neither got into any trouble. Under the circumstances, pursuant to 18 U.S.C. §3651(¶4), Judge Clarie found each to be a violator, ordered the probation of each extended for one year, and added the special condition that each submit to random urinalysis. App. 9-11. Supervision was transferred to New Jersey.[2/]

The probationers pressed their motion to dismiss by filing a Petition for Reconsideration of Defendants' Motion to Dismiss Probation Violation Proceedings and to Vacate Judgments of Conviction and Sentence, App. 12-13, together with a Memorandum of Points and Authorities. The petition alleged that on certain specified dates during late 1972 and early 1973, Chico and Colello were brought three times each from state custody to federal court for disposition of the charges pending there,

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2/ Upon leaving the courtroom, Chico was arrested as a state parole violator and, at this writing, remains in Connecticut custody awaiting a final revocation hearing.

in violation of Article IV(e) of the Detainer Agreement. The petition was denied by endorsement dated December 13, 1976, before the government responded. App. 12. This appeal followed.

ARGUMENT

THE DISTRICT COURT SHOULD HAVE DISMISSED THE PROBATION VIOLATION PROCEEDINGS AND VACATED THE APPELLANTS' JUDGMENTS OF CONVICTION, BECAUSE THE INTERSTATE AGREEMENT ON DETAINERS REQUIRES DISMISSAL OF THE INDICTMENT.

When a federal grand jury indicted the appellants on October 10, 1972, each was incarcerated at a Connecticut state institution, serving a sentence of five to seven years. Pursuant to writs of habeas corpus ad prosequendam, 28 U.S.C. §2241(e)(5), each was produced in federal district court but was returned to state custody after pleading not guilty. When this retransfer occurred, each was entitled to a dismissal of the indictment with prejudice, pursuant to Article IV(e) of the Interstate Agreement on Detainers, which provides:

> If trial [in the receiving jurisdiction] is not had on any indictment ... contemplated hereby prior to the prisoner's being returned to the original place of imprisonment ..., such indictment ... shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

See United States v. Mauro, 544 F.2d 588 (2d Cir. 1976). No defense motion was required, nor was the Agreement's protection waived by the lapse of the pretrial motions period. United States v. Cyphers (Ferro), Nos. 76-1131, 76-1160 (2d Cir., Feb. 8, 1977), slip op. 1737, 1743-46.

Nor did the appellants waive the Detainer Agreement by their subsequent pleas of guilty. By relinquishing jurisdiction to Connecticut, the United States lost the right to return the

appellants to court at all. Such a claim is not waived, even by a counselled plea. Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21, 30-31 (1974). Cf. United States v. Ford, No. 76-1319 (2d Cir., Feb. 3, 1977), slip op. 1681, 1698 (Article IV(e) waived by expressed desire to return to state custody).

When the appellants returned to answer charges of violation of probation, the court's obligation to dismiss which had accrued four years earlier, remained. In Hilbert v. Dooling, 476 F.2d 355, 362 (2d Cir., en banc), cert. denied, 414 U.S. 878 (1973), this Court held that where a district's speedy trial plan required dismissal at an earlier stage, the trial judge was "without power to deny [a] motion to dismiss" later proceedings. The situation here is analogous. Cf. Ferro, supra (dismissal by appellate court where issue raised there in the first instance). Moreover, the Supreme Court agreed in Pollard v. United States, 352 U.S. 354 (1957), that a district judge, confronted by a well-founded claim that the judgment of sentence was invalid, acted correctly in declining to adjudicate a probation violation charge. Id. at 357. Judgment had been formally pronounced against Pollard when he was not physically present, in violation of Fed. R. Crim. P. 43(a). The Court held that the trial judge properly overruled Pollard's double jeopardy and speedy trial objections on their merits before proceeding to fulfill its continuing obligation to impose sentence. Cf. Miller v. Aderhold, 288 U.S. 206 (1933). Applying the Pollard

procedure to this case, the district court first should have ascertained the validity of the underlying judgments. Finding the indictments to be subject to mandatory dismissal under Mauro, the court should have vacated the judgments and dismissed the probation violation proceedings, releasing the appellants from supervision.

CONCLUSION

The orders below should be reversed and the case remanded for dismissal of the indictment with prejudice as to each appellant. If the government does not concede the truth of the facts alleged in the probationers' Petition for Reconsideration, App. 12-13, the orders should be reversed and the case remanded for a hearing, after which, upon proof of those facts, the dismissals should enter.

Respectfully submitted,

Peter Goldberger

Dated: February 14, 1977

PETER GOLDBERGER
ASST. FEDERAL PUBLIC DEFENDER
770 Chapel Street
New Haven, Connecticut 06510
(FTS) 8-643-8148
Attorney for Appellants

CERTIFICATE

I mailed two copies of Appellants' Brief and Appendix to Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut, this 14th day of February, 1977.

Peter Goldberger